UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
------------------------------x

JEANNE MARCHIG,
THE MARCHIG ANIMAL
WELFARE TRUST,

Plaintiffs,

v. 10 Civ. 3624 (JPO)

CHRISTIE'S, INC.,

Defendant.

------------------------------x

February 7, 2012
3:30 p.m.

Before:

HON. J. PAUL OETKEN

District Judge

APPEARANCES

LAW OFFICE OF RICHARD A. ALTMAN
Attorneys for Plaintiffs
BY: RICHARD A. ALTMAN

ANDREWS KURTH LLP
Attorneys for Defendant
BY: JOSEPH A. PATELLA

(Case called)

(In open court)

MR. ALTMAN: Richard Altman, 285 West Fourth Street, New York 10006, for the plaintiffs.

MR. PATELLA: Good afternoon, your Honor. Joseph Patella with Andrews Kurth on behalf of defendant Christie's.

THE COURT: Good afternoon. So, I have a few questions in this case.

I have defendant's motion to preclude the testimony of Ms. Marchig in the case based on the failure to conduct her deposition. Plaintiff has opposed the motion to preclude and has also filed a motion for partial summary judgment which has an affidavit of Ms. Marchig, essentially I guess a preview of what she would testify to.

I guess one question I have is: Do the parties agree on the approximate value of the frame? What's the value of the frame?

MR. ALTMAN: We have bandied some numbers about without a lot of evidence to support them, frankly.

THE COURT: What do you think it is?

MR. ALTMAN: Somewhere around $40,000, between 35 and $50,000, something like that.

MR. PATELLA: The painting was initially sold for 22,000, so I find it hard to believe that the frame would be more than that even with the passage of time.

THE COURT: Right.

MR. PATELLA: But we haven't reached the point of actually valuing it.

MR. ALTMAN: I have spoken to a couple of experts about it. It's an antique Florentine frame, and it does have some significant intrinsic value. I can't have a more precise estimate. I have a photo which is not a great photo, but I got this from Mrs. Marchig and also from a frame expert that I actually to.

THE COURT: OK. So, the frame is worth what it's worth. Ms. Marchig's position is, and her testimony is, that when she packed this crate with nine drawings, that she included the frame and eight other drawings without a frame. Is that right?

MR. ALTMAN: I'm not sure. I think some of the other ones had frames, but I'm not positive.

THE COURT: Can't this be resolved by the pounds? I notice that the invoice says 15.2 kilograms.

MR. ALTMAN: Yes.

THE COURT: Can it be resolved as a matter of evidence whether 15.2 kilograms -- that's about 35 pounds, I guess --

MR. PATELLA: Your Honor -- go ahead.

THE COURT: It seems bizarre to me that there is a disputed issue of fact when there is no record evidence about whether or not -- at least that I've seen -- about whether or not she included the frame when she packed it. Everything else is undisputed. It was sold in a different frame, the frame wasn't part of the sale, you know there seems to be no dispute about that. But one thing we know, the package that she packed was 15.2 kilograms, because that's what it says. What does the frame weigh?

MR. ALTMAN: I can't answer you. I'm not going to speculate. I don't know the answer.

THE COURT: OK. Mr. Patella?

MR. PATELLA: What I was going to say is that was certainly the direction we were heading toward in our view of the case, and in the event that preclusion would be granted, based on the documentation, it seems that given the small packaging in connection with eight paintings -- eight drawings -- and the fact that the documentation indicates that Ms. Marchig complained of the need to avoid excess shipping costs, so the documentation seems to raise some serious questions as to whether in fact, as Ms. Marchig claims, the frame was indeed packed.

MR. ALTMAN: Well, I would say with regard to the weight that it is not that large, it's approximately 13 or 14 inches by about ten or so inches; it's not much larger than a sheet of paper. So, the fact that it's 15 kilograms wouldn't preclude automatically -- wouldn't entitle you to conclude that it was not in the box, it would seem to me. It's not a large drawing or a large painting that we're talking about, after all.

THE COURT: OK. Is there documentation that Christie's has produced that is inconsistent with the idea that she packed the frame, or that the frame was there when Christie's received it?

MR. PATELLA: Well, the documentation we have, your Honor, simply indicates that the packaging was small, as your Honor pointed out, and that Ms. Marchig, it was important to her to avoid excess shipping, and that the drawing was included with eight other drawings or paintings, to create in our view almost an impossibility that they could have all been framed when they were shipped.

But I can't say to you that I have a document to say nine pictures delivered, none with frames, or nine pictures delivered, these four with frames. We do have the shipping information which your Honor has noted, and that's what we're basing our position on.

THE COURT: But there is no picture of the packed crate, or the crate being unpacked. So, basically the remaining issue in this case turns entirely on the recollection of Ms. Marchig, or someone at Christie's, and the other circumstantial evidence about what a frame would weigh, etc.

MR. PATELLA: Yes.

THE COURT: There is nothing else.

MR. PATELLA: I don't believe so, your Honor.

THE COURT: OK. And who has the burden of proof? Plaintiff has the burden of proof.

MR. ALTMAN: Certainly. I would also point out that there is some circumstantial evidence because of the fact about Mr. Bourne stating that he wanted to change the frame. And this is something that was --

THE COURT: Which way does that cut? I would think that hurts you. I mean she knew that he wanted to change the frame, so she didn't pack the frame.

MR. ALTMAN: No, she insisted that it not be changed.

THE COURT: OK.

MR. ALTMAN: So, I guess what I'm suggesting is that he switched it and took it for himself, which again is a circumstantial conclusion.

THE COURT: Well, has he been deposed?

MR. ALTMAN: No, he is in London, and it didn't fit within everybody's schedule to do it, or the expense, it would have been rather astronomical especially since the main claim was dismissed.

MR. PATELLA: Your Honor, I would say quite the opposite. You know, given what is established in the declaration of Mr. Bourne viewing the work in her presence, and then making the recommendation before she shipped it off that the frame should be changed, would lead especially, again, to her desire to avoid shipping cost and she is shipping other works, to not include the frame as originally shown to Mr. Bourne.

MR. ALTMAN: Could I point out something also about the burden of proof here?

THE COURT: Sure.

MR. ALTMAN: It's a replevin and conversion case, and it seems to me that I have satisfied my burden of a prima facie case simply by stating under oath that I shipped it to them and put it in their possession. It seems to me, since we are getting into this, in order to create an issue of fact somebody has got to say I opened the box and there was no frame.

THE COURT: I mean you have the burden of proving. You can't just say it. I mean I could say I shipped a diamond ring to someone, and then they have the burden of disproving it? That can't be the law.

MR. ALTMAN: If you said it under oath, I would say they would.

THE COURT: The plaintiff has the burden of proof.

MR. ALTMAN: Clearly.

THE COURT: And that includes proving that your client shipped the frame.

MR. ALTMAN: By a preponderance of the evidence, proving that she shipped it.

THE COURT: Exactly.

MR. ALTMAN: I can't imagine any other proof at this juncture other than her sworn statement that in fact she shipped it and here is a photograph of it as I shipped it and so forth. I don't know what else could be done. She didn't think to take a photograph of the box when it was picked up, so...

THE COURT: No, I understand. The reason I'm asking about these merits questions is partly because I'm just curious and it's interesting, but also because this all goes to the nature of proof that will need to be established and whether there is going to be any chance of summary judgment for either side here, or whether this is just a case that's going to have to go to trial.

It seems to me it's going to be hard to be a summary judgment case. Irrespective of how you sort out the burden of proof, the whole thing turns on whether her testimony is credible and it's to be believed that she packed the frame and sent it to Christie's.

MR. ALTMAN: Well --

THE COURT: There is no other evidence.

MR. ALTMAN: -- on a summary judgment motion, your Honor, it's quite clear that the opponent of summary judgment cannot oppose it by simply saying it's not believable, she is not believable, it's not credible.

We will leave apart the issue of the deposition for the point I'm trying to make, but I think it's clear that you don't create an issue of fact just by saying this person is not credible. You create an issue of fact by someone with knowledge directly contradicting what this person has said under oath. So, that is what it seems to me, and that seems to be the crux of it.

If Christie's had been able for all this time -- I can't believe when a box comes in consisting of some valuable artworks to be auctioned that it's not precisely logged, that somebody doesn't create a record and opens the box and sees that it was in the same condition that it was supposed to be when it was sent, and so forth and so on. So, that's the point I have trouble understanding, and it seems to me that that is Christie's' burden to come forward with something to dispute what she says.

MR. PATELLA: Of course, your Honor, it's Christie's position that Ms. Marchig's declaration should not be considered and she shouldn't be heard given what has occurred here, particularly your Honor's order of November 21, 2011 in which you denied the plaintiff's request for a video conference deposition and reaffirmed the prior order of October 24, 2011 directing Mrs. Marchig to appear for her deposition by the end of November. And your Honor even indicated in that order that if she fails to complete her deposition, her testimony may be subject to preclusion.

And I think this exchange that we have just had with your Honor magnifies just how important her testimony would be in a replevin claim. So, it's very difficult for Christie's to understand why we had all this difficulty with her willing to appear and her refusal in the face of three orders of the court to appear. From our view it would seem to justify preclusion. If there was ever a case for it, this seems to be it, given the procedural history which we have outlined in our papers where the plaintiff began this case by wanting nothing more than to be deposed, whether it's in Switzerland, Geneva, New York. There were all of these indications to be deposed. Not withstanding her health conditions, that was fully on the table at the outset of this case. And yet when Judge Koeltl then decided that the deposition was going to be abroad, Ms. Marchig would have to pay Christie's expenses, and from that point on we all of a sudden got alternatives now to an in-person deposition, a deposition that she so badly wanted initially.

First, there was let's examine her right before trial so she only has to make one trip. Then it was the video conference deposition which this court denied.

It's ironic, because what plaintiff was trying to do is avoid -- we pared down our number at the direction of Judge Koeltl. The expenses are $6500. Your Honor, we have spent more than that litigating this issue.

It seems at this point that enough of an opportunity has been given for Ms. Marchig to tell her story. And for her now to be allowed to move ahead with a dispositive motion -- which, granted, I would think would be a question of fact that won't be granted -- and also to proceed to trial, with being able to escape a deposition and being cross-examined during the course of discovery seems highly prejudicial to Christie's. And given the circumstances, every opportunity was afforded to her to be examined.

So, our position -- and I am happy to further discuss the summary judgment issue -- is we don't get there, your Honor. The pending motion fully briefed before you warrants that a preclusion be granted. Then, you know, we can explore whether Christie's has a position to get a summary judgment in the absence of any proof from the plaintiff.

THE COURT: Mr. Altman, do you want to respond briefly?

MR. ALTMAN: Yes. First of all, I think it's fair to say that the tenor of the case changed rather drastically after the Second Circuit, and the willingness to show up when we were talking about potential liabilities that were very significant I think is different from what it is now. That's just a practical fact.

So, whether your Honor precludes or doesn't preclude, you have the papers; I have set forth my position about that, and you have made your Honor's position clear too.

My point in making the summary judgment motion was to have a record, quite frankly. I am entitled to do that. If I had waited until the preclusion order came down, if you decided to do so, I would have had no evidence on the record. I have the evidence on the record, and so it seems to me that there is enough here to allow us to go forward.

I think that the subject of a video conference deposition is still on the table. Her reluctance and her change of mind about this I can explain because I've spent time with her and I've spoken to her. It has to do with, A, the changing nature of the case and the fact that her clam is now a fraction of what it was; it has to do with her health being up and down; she is 87 years old. It has to do with her willingness or unwillingness to pay those kinds of expenses to recover potentially only a slight multiple of those expenses.

And this is a matter of, I don't know, I guess it's totally discretionary with your Honor how you want to handle this discovery dispute. I think that it is still acceptable to her to participate with a video conference, if that would satisfy. I have seen her in the last month, and she is fine. She is not in great physical health --

THE COURT: Sorry. Here in New York?

MR. ALTMAN: No, no, that was in Europe. No, no, believe me I would have dragged her into Mr. Patella's office.

THE COURT: I would have dragged her in.

MR. ALTMAN: I would have happily done so.

So, I saw her in Europe, and physically she is not in wonderful shape, but mentally she is as sharp as ever. And I will still offer that, if that's a possible way to move this forward and not have to have --

THE COURT: I mean you must agree that if I denied summary judgment and just scheduled a trial in two months or three months or whatever, she is going to need to come testify at trial.

MR. ALTMAN: Quite so.

THE COURT: And she is willing to do that?

MR. ALTMAN: I think she is. Of course she is, because she will lose the case if she doesn't come; she will lose it on the merits, of course. She would be willing to do that.

MR. PATELLA: May I add a point, your Honor?

THE COURT: Yes.

MR. PATELLA: And I only want to do this because it was in my notes, but essentially Mr. Altman just said it for everyone to here, after the Second Circuit decided its opinion, this plaintiff has demonstrated a lack of seriousness for this replevin claim.

Whether the case is $150 million or $15,000, she has an obligation as a plaintiff, and if this claim was serious to her then she would have agreed to be deposed.

Plaintiff admitted that she was willing to travel within Geneva, to go to a nearby office to sit for a video deposition. If she was willing to do that, why couldn't we have gone there to take the deposition?

What we see in terms of the declaration that Ms. Marchig filed with this court, and the actions of her counsel -- which were discussed at length with Judge Koeltl in publicly speaking about this case -- is that this replevin claim is doing nothing more than to publicize the issues of authenticity, that they believe this to be a da Vinci. She is not serious about this replevin claim, because if she was, her actions would dictate otherwise.

And it should not be a factor that the ad damnum now has been significantly diminished. As a plaintiff who commenced this action, she had an obligation to conduct discovery and abide by the court's orders. It wasn't one, it wasn't two, it was three court orders to appear for a deposition, and we were willing to be flexible and travel out there, and she just didn't do it. It does not seem fair that this case be allowed to proceed when you have a plaintiff who has really demonstrated a lack of seriousness for this case.

THE COURT: No, I take your point, and I agree this stuff about her health is to be considered in whether she needs to travel, but that's kind of a nonissue, because the issue now is whether she should be willing to pay the $6500. On the other hand, the case dramatically changed after the Second Circuit's ruling. I mean that's a fact. And it's not irrational for a party to weigh the costs and benefits differently when the case goes from being a multi-million whatever dollar case to whatever it is, a $30,000, $40,000 case, and suddenly you are talking about real money.

Obviously, given what's left of the case, Christie's is also defending a case as a matter of principle. You know, I assume it would be more cost effective for the defendant to simply settle the case but, you know, as is their right, they don't want to do that.

On the other hand, I take your point that she filed a case in New York, and she is the plaintiff, and I absolutely agree that her testimony is central to what is left of the case. I mean there is no question.

I do think that defendant would be prejudiced by the inability to conduct a deposition in the case. I do at the same time recognize that preclusion -- and the reason I said in my order that her testimony may be subject to preclusion is I hadn't yet decided when weighing all the factors whether it should in fact be precluded. I don't think an affidavit standing by itself is enough to give the defendants. I think they need a chance to depose her because her recollection and credibility are at the heart of what is left of the case. That's really the very important piece of what is left.

And when I look at the cases on preclusion and the factors that should be considered, it's a tough balance, and it's particularly tough in a situation like this where precluding the testimony would essentially, as Mr. Altman points out in his brief, would essentially end the case, which makes it a very severe remedy in exactly this situation.

Given that, and in retracing the time line of kind of when her willingness to be flexible about coming somewhere for a deposition, or paying for a deposition to be taken, when it changed, in fact it changed when the stakes of the case dramatically changed, and I don't know that that's a completely impermissible factor in whether she should be willing to do it.

Now, one question I have is I seem to recall that you can't take depositions in Switzerland. Is that still the law?

MR. ALTMAN: It requires court order from a Swiss court, and so it would require hiring a Swiss lawyer -- who I have actually spoken with -- and doing it.

To merely show up, as I understand it, even on consent of all parties, is illegal, and we could be arrested literally for doing so. So, that's apparently a problem.

I guess the interesting question is is that the rule with respect to a video conference where only the deponent is in Switzerland. I have no opinion, although I would imagine that it's no different from going to an office and saying anything else.

MR. PATELLA: And this issue was previously mentioned at one point to avoid when too avoid this possibility plaintiff had offered to go to London to be deposed.

THE COURT: But that never happened.

MR. PATELLA: No.

MR. ALTMAN: No.

MR. PATELLA: And, your Honor, in terms of the factors that we actually lay out in our brief -- and it's not all factors have to be satisfied, this is for the court's direction -- we identify the four in our brief at the bottom of page 5, going into page 6, we believe we satisfied three of the four.

We don't think plaintiff gave a legitimate explanation of failing to comply with the discovery orders. We have established the prejudice that we would suffer. And in terms of the possibility of continuing the case, I mean again we haven't heard even at present Ms. Marchig is willing to sit for an in-person deposition, whether it be in New York, London or anywhere else. So, I don't know what value that has as well.

Look, I recognize, and I knew coming to court today this is a harsh remedy, and I recognize that. We wouldn't be making this motion if we didn't think we had the right set of facts to present to your Honor for this. And again this is not a "we gave you one chance and that's it." There were many, many chances here that were just not followed through by the plaintiff that we believe justify the preclusion.

THE COURT: No, I agree that there were several chances, and I think the plaintiff mentions in the brief that the idea of a videotaped deposition had come up earlier, but in fact it was fairly late in the game the idea of a videotaped deposition. However, considering the factors, considering the explanation for the failure to comply, it strikes me as at least in part a product of a different assessment given the Second Circuit decision, not an irrational one in terms of the costs of litigating the case. And given the harshness of the remedy, it's very hard for me to grant the preclusion when there is something that could be done, which is a videotaped deposition, which is, you know, increasingly done in this District and in other districts, and is much more cost effective.

I don't see that it would significantly prejudice the defendant to have a videotaped deposition. So, I am inclined to reconsider my order and allow a limited period of time. And this is obviously one last chance, because I realize that there were orders requiring the deposition, but given the change in the stakes of the case, I do feel like preclusion would be a harsh remedy when you are talking about the only opportunity to do the deposition costing the plaintiff $6,500 which is a big chunk of the case basically.

MR. PATELLA: Your Honor, just two points logistically on a video deposition. I did one once, and the problem is twofold: Use of exhibits. You know, no, it's that one, you know, it's hard to coordinate documents with a video deposition. And again this is admitted in their papers, we're dealing with a woman of advanced age who has hearing problems. You know, there is a lot to be said to being able to sit next to the person and ask them questions and get a sense not only from their answers but their mannerisms and how they handle the questions.

I don't have authority for this, but I think Christie's would much rather slice off a little of their $6500 than actually take a video conference deposition. I think that would actually be more prejudicial to Christie's, because I think it's going to be a logistical nightmare, given the plaintiff, given the documents that we have.

So, I understand your Honor's inclination to create one more chance. Is Mrs. Marchig willing to appear for a deposition in London, Mr. Altman?

THE COURT: Is that still a possibility or not?

MR. ALTMAN: It's a possibility. She is on vacation in Spain, where she goes to escape the cold in Switzerland, and I have no reason to think she wouldn't, let's put it that way, go to London, or to try it by video and maybe to go to London as a fallback if Mr. Patella's fears materialize. But if it works, then it could be done. And she does have a hearing aid.

Sometimes she has problems, but when I'm with her she doesn't seem to have any problems understanding me.

So, I think that if you are inclined to let us do that, we could certainly try to do it by video, and if there is a problem, at least I'm sure Mr. Patella and I could figure something out.

THE COURT: Well, I think with respect to exhibits, you just have to be clear, to have a clearly labeled set of exhibit to Mr. Altman, with plenty of time to get them to her and just 1 through whatever, that are clearly marked and refer to them by number.

MR. ALTMAN: And it wouldn't come as a surprise to her. I don't think there is any problem with any new documents that haven't been seen yet, I guess is what I'm saying. What I provided came from her.

MR. PATELLA: If I may, your Honor -- and again something that Mr. Altman just said to all of us -- she is traveling to Spain. I question whether there is a health issue here.

Your Honor, we have gone through a fair amount of expense for this. If the desire of this court is to give her another opportunity to take a deposition, this court is within its powers to order her to come to New York to be deposed. We don't have to deal with the $6500 then, and we can take this deposition and move ahead. I think, look --

MR. ALTMAN: An hour flight is not an eight hour flight, your Honor. I mean that's what I would say. And that's really what we are talking about here.

THE COURT: Well, she was willing to go to London at some point before. Is she going to London anyway, do you know?

MR. ALTMAN: No, not to my knowledge, no. I can certainly pose it to her and let her know.

THE COURT: And if you went to London there would be no shifting of deposition costs, right?

MR. PATELLA: Our position, your Honor, would be, as indicated and established by Judge Koeltl, that the expenses should be borne by Ms. Marchig.

THE COURT: No, video. People do video depositions all the time; you can try it.

MR. PATELLA: No, I'm sorry. I misunderstood your question. That if we actually did it in person in London?

THE COURT: That's what I said. And I'm now saying it's going to be by video.

MR. PATELLA: Am I to understand if Christie's were willing to pay its own way, you would order an in-person deposition in London?

THE COURT: I'm not going to make her go to London, no. I mean if you pay your own way and you want to do it in Geneva, you can do that, but I don't know what the details of that would be. There is no reason you can't try to do a video deposition. It's too harsh a sanction to have her case thrown out.

MR. PATELLA: I understand.

THE COURT: I'm not going to preclude it. I think we're going to have a trial in this case in a few months, and I think she is going to need to come for that.

MR. ALTMAN: If it isn't resolved, she will come. But may I -- well -- I think if you want to discuss that possibility, then maybe we should talk about the summary judgment motion, because --

THE COURT: Well, I'm going to deny your summary judgment motion for failure to follow my individual rules.

MR. ALTMAN: Which --

THE COURT: My individual practices on my website for all to see.

MR. ALTMAN: Yes, I read them.

THE COURT: Yes, they say you need to file a premotion letter before filing any motions.

MR. ALTMAN: Your Honor, we had done that. We had done that with -- you had said --

THE COURT: I had said no motions for summary judgment may be filed.

MR. ALTMAN: I believe what you said in the order was that the dates for filing the summary judgment motion would be adjourned --

THE COURT: Yes.

MR. ALTMAN: -- until the decision on the preclusion.

THE COURT: Yes, but there was no --

MR. ALTMAN: Motion.

THE COURT: But there was no premotion letter outlining the proposed motion for summary judgment, which I require on all motions for summary judgment.

MR. ALTMAN: We had submitted -- no, I had asked for the permission. We had already scheduled a summary judgment motion because the dates -- because -- I had written to you about this, and we had set dates for a summary judgment motion. Or maybe it was Judge Koeltl who set them.

MR. PATELLA: Right.

THE COURT: There might have been dates from before.

MR. ALTMAN: That's correct.

MR. PATELLA: But the motion to preclude replaced those dates, and summary judgment was taken off the calendar.

MR. ALTMAN: Right, there were dates that Judge Koeltl had set for making the motion, and then --

THE COURT: And I adjourned the dates.

MR. ALTMAN: You adjourned the dates. But again I believe -- the authority is in my brief -- that I had the right to file the motion.

THE COURT: Well, my individual practices say you have to file a letter before you file a motion. And there was no premotion letter.

MR. ALTMAN: Well --

THE COURT: But, you know, actually your motion turned out to be somewhat helpful, because it acted as a proffer of what Ms. Marchig's testimony would be. So, in a way it was helpful. I don't mind that you did it, but in fact it was in violation of my individual practices, so I'm not going to hold that against you, but I'm going to deny it.

MR. PATELLA: Your Honor --

MR. ALTMAN: That's a distinction without a difference, I would say.

MR. PATELLA: Your Honor, I see that the court is not inclined to grant preclusion. I guess the last point I want to make though is that it seems that Christie's' position is that the blatant denial of three court orders by the plaintiff shouldn't be met without any consequence whatsoever.

So, again given the nature of the plaintiff's advanced age and hearing problems, we would like the opportunity to be able to depose her in person, and if that can be in London, we would like to make those arrangements rather than do it by video conference.

It seems she got the ability to avoid this on three separate occasions, and there is no consequence as a result of that. We have gone through a lot of expense on this preclusion motion. I understand where your Honor is going on that remedy and that's fine, OK, but let a defendant be able to go through the usual course of a litigation and take a traditional deposition so that it can properly prepare for dispositive motions and for trial.

THE COURT: You know, I mean she is 87 years old. You know, it's true she is in Spain, but, you know --

MR. PATELLA: And the Canary Islands. She lives pretty well, Ms. Marchig.

THE COURT: Yeah, we should all go to the Canary Islands and do her deposition. But is she going to the Canary Islands anytime soon?

MR. ALTMAN: Probably. Again, she goes there to get away from the cold. It's very cold in Geneva.

MR. PATELLA: Then why not New York?

MR. ALTMAN: I'm not going to be disingenuous. She is not a poor woman by any means.

MR. PATELLA: Well then --

MR. ALTMAN: Wait. But again the fact that she for an hour or two for a flight is very different form going, let's say, to New York.

THE COURT: But the Canary Islands, where is that?

MR. ALTMAN: It's about two or three hours -- it's off the West Coast of Africa, and it's about three some hours -- it's about two to three hours from Geneva.

THE COURT: Is she taking this case seriously at all?

MR. ALTMAN: Absolutely. She is furious.

THE COURT: She is furious?

MR. ALTMAN: She is furious. She does not understand.

THE COURT: But is she intentionally not sitting for a deposition because she doesn't want to sit for a deposition? That's kind of what is going on here.

MR. ALTMAN: No, I will be frank, she doesn't feel that she should have to pay. She doesn't feel she should have to pay, given the stakes. And she has repeated to me that she is willing to show up for a video. So, I mean that's really what it comes to. And, you know, I have had a hard time explaining the Second Circuit's reasoning to her, let alone to myself, but it is what it is. Her feeling is how could I be out of court before I knew I could be in court.

MR. PATELLA: The court ordered the issue on payment. A litigant can't just say I don't feel like following that order. I am struggling with this.

It seems that what we've fought the issue on two separate occasions before Judge Koeltl on expenses. Our papers indicate it was addressed once. Then after the Second Circuit, Mr. Altman, using his own words, wanted to revisit the issue of expenses. Judge Koeltl said as the plaintiff who picked this venue in this court, if you are not coming here to be deposed, it's your responsibility to pay for the expenses. She can't just simply say I don't feel like doing that.

THE COURT: No, it's true, but you are ignoring the reality of how the case changed when 95 percent of the case was thrown out, and suddenly $6500 is a lot of money in the context to the case.

MR. PATELLA: Correct, your Honor, but plaintiffs who also ignore discovery disorders get sanctioned for the cost of motions to preclude or motions to quash all the time, so we could use the $6500 to just award defendants for their motion, or close to that. I don't care how the money is allocated. It just seems she is flouting the court's rules and being able to get away with it.

I understand you are not going to grant preclusion, but respectfully --

THE COURT: What else can I do?

MR. PATELLA: -- we respectfully ask for the ability to take an in-person deposition of Ms. Marchig in London at the expense of the plaintiff. That's what we're asking for.

THE COURT: OK. Mr. Altman, it seems reasonable.

MR. ALTMAN: That I should pay for them to come to London?

THE COURT: Oh, at the expense of plaintiff?

MR. PATELLA: Or that she come to New York.

MR. ALTMAN: But we're back at square one, your Honor, and that's not moving forward.

THE COURT: Yes. I mean if I'm not going to grant preclusion, we're left with an affidavit. You know, let's assume we deny summary judgment, then we go to trial, then, you know, you are going to have to cross-examine her without having deposed her.

MR. PATELLA: Correct.

THE COURT: So, I mean I think that a videotaped deposition is better than nothing for you.

MR. PATELLA: This is somewhat morphed into I'm thinking a settlement discussion in the sense that -- again, I don't have the authority, I didn't expect to do this -- I think it's very important to my client in speaking to my client to be able to do an in-person deposition.

If Christie's is willing -- and again I have no authority for this -- but if Christie's is willing to cut their expense of $6500 in half -- now I'm really showing how important it is to do an in-person deposition and how prejudicial it would be to the defendants if not -- would that be something that we could get this court to agree to, and maybe we can take an adjournment so I can get that authority?

THE COURT: No, I mean you have not persuaded me that a videotaped deposition is so prejudicial; I mean courts order it all the time.

MR. PATELLA: But yet, your Honor, you're saying if we're willing to forgive the expenses you are OK with us going to London. So, it seems that that's the issue that we need to try and reconcile.

THE COURT: Well, I'm not going to make her go to London either. I mean --

MR. PATELLA: She might be willing.

THE COURT: If she's willing, that's great. If she's willing, that's great, but I think a videotaped deposition is reasonable under the circumstances.

I think, you know, it does happen a lot of times when there is an out-of-country witness or party, you know, I think you should be able to ask her the questions you can ask her by videotape. Do you know that this can be arranged? Is there an office nearby where they can do it?

MR. ALTMAN: When we took the deposition of Ted Ganz, I spoke to the reporter at that time. They have an office, or they know of some office, a business office, in Geneva, there is an office here in New York, in Midtown, I think not far from Mr. Patella's office, and the idea is that they hook it up, and everybody goes to their respective offices. It costs a couple hundred dollars for the day. It costs a few hundred dollars for the day.

MR. PATELLA: Your Honor, would it at least be permissible that the parties would have the option, if it's on agreement of both sides, to conduct a deposition in London, and I can see if I can convince my client to do it on their own dime, if Mr. Altman and Ms. Marchig are willing to do that?

THE COURT: Absolutely.

MR. PATELLA: Mr. Altman?

MR. ALTMAN: If she is willing to do it, it's fine with me. I have a couple of reasons to go to London; that would be fine.

I think what concerns me though is that it's still winter, and I don't want to delay this. I don't want to delay this until the weather gets warmer, which is probably something that would have to be raised. I don't want to have to get into that with her or with Mr. Patella.

MR. PATELLA: We could go to Geneva, if we're willing, I guess, to retain a Swiss lawyer.

MR. ALTMAN: It's colder, and that would cost more money too.

Your Honor, I don't think we need to burden the record with this problem. I'm certainly willing to discuss it with Ms. Marchig and discuss it with Mr. Patella about going to London. But I would suggest that we could leave this courtroom with the notion of a video deposition, and if there is a problem or an agreement to go to London, fine.

THE COURT: Yes, but the burden is on the plaintiff for the deposition to go forward.

MR. ALTMAN: Indeed.

THE COURT: Otherwise, I am going to reconsider the motion to preclude.

MR. ALTMAN: Indeed. Of course that's understood.

THE COURT: I mean, Mr. Patella is right that she has had a number of opportunities. The only reason I'm doing this is because there is something to the fact that the stakes of the case changed, so I have more sympathy than I usually would to the unwillingness to pay the expense; and the severity of the sanction of preclusion. I mean that's the only reason I'm giving one additional opportunity.

How many hours do you need to depose her?

MR. PATELLA: The case has been limited to the frame, so I wouldn't think it's a full day. Again, it's hard to estimate.

THE COURT: Two hours?

MR. PATELLA: I was just going to pick ran outside time of four, just to have an outside time. But again if the parties are willing to go through the set-up of a videotaped deposition, I'm assuming everybody is going to block out that day to just get it done.

THE COURT: How much time do you think, Mr. Altman?

MR. ALTMAN: I think half a day seems plausible.

THE COURT: OK. Up to four hours?

MR. ALTMAN: I won't get up and walk out. I mean we're doing it on video, so therefore there no reason to cut it off arbitrarily. I don't want to be an obstruction; he can ask whatever he wants.

THE COURT: OK.

MR. PATELLA: Again, your Honor, I wouldn't see a reason why we would need to set an actual particular timeframe, but I am happy to follow the court's direction.

THE COURT: OK. Upon reconsideration of my earlier order, I'm going to deny the motion to preclude without prejudice docket number 47, deny it without prejudice to its possible reassertion at a later time.

I am going to give an additional 45 days to arrange for a deposition, which will be by video, and make sure it's recorded obviously, up to four hours.

If the parties can agree on an in-person deposition, each baring their own costs, and they can agree to that, that's fine, also within 45 days, either in London, Spain or wherever, the Canary Islands. And if it hasn't happened in 45 days from today, I'm going to reconsider highly favorably the motion to preclude Ms. Marchig's testimony, because it's obviously at the center of the case, it's very important.

However, I do find that a videotaped deposition is not so different from a live deposition; it's done more and more in international situations. And she may be hard of hearing, but you can find one where you can turn up the volume, and I think that a videotaped deposition is not very prejudicial compared to the prejudice that preclusion of her testimony would lead to.

On plaintiff's motion for partial summary judgment, I understand why they filed it, but I do think it's premature. I'm going to deny the motion for summary judgment of docket number 54 and docket number 60, also without prejudice. I'm denying it for failure to comply with the individual rule 4(f) requiring premotion letter outlining the basis for summary judgment, but I'm denying it without prejudice depending on whether it will be necessary at a later date to file the same motion or to file the revised motion, depending on whether there is testimony or a motion to preclude or whatever. So, it's possible, depending on how things pan out, that I will reconsider the motion for summary judgment, but as of now I'm denying it.

And I do want to emphasize that there have been a few orders in this case requiring her deposition. There has been a change of position, and I have warned that her testimony might be precluded, and the deposition still didn't happen in November. This 45-day period will be the last chance for her testimony to happen in discovery and likely the last chance for it to exist in the case. OK?

MR. PATELLA: Your Honor, one point of clarification. If for whatever reason on the day of the deposition we're coming up on four hours, and we're able to make a proffer as to why we need to extend that time, may we call the court from the deposition to be able to -- again, I just want to be prepared for all possibilities -- to be able to get extra time?

THE COURT: Yes, you can call, but I think four hours is going to be enough. But you can call if you feel like there is a good reason for it.

MR. PATELLA: Thank you, your Honor.

THE COURT: OK. Anything else for today?

OK. Thank you, gentlemen.

- - -